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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1991

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,
*Petitioners,*

VS.

MARCH FONG EU, et al.,
*Respondents.*

**Petition for a Writ of Certiorari to the California Supreme Court**

## REPLY BRIEF OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL. TO OPPOSITION BRIEFS OF RESPONDENTS CALIFORNIANS FOR A CITIZEN GOVERNMENT AND MARCH FONG EU

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Petitioners reply herein to oppositions to the Petition for a Writ of Certiorari by both respondent Californians for a Citizen Government and respondent March Fong Eu. The former opposition concentrates on rhetoric, the latter dramatically shifts position as to the applicable standards and raises new issues that have no bearing on whether certiorari should be granted. Both briefs illustrate the very confusion that respondents claim does not exist.

On the critical points, however, there is agreement. Both respondents concede the importance of the term limit issue and that this Court will ultimately have to decide that issue. They would just prefer that the Court not review term limits in the context of this case. But, as the Petition for Writ of Certiorari

demonstrates, this is precisely the case that best focuses the issues, and now is the time to decide them.

## I

## THE CALIFORNIANS FOR A CITIZEN GOVERNMENT BRIEF DEMONSTRATES THE NEED FOR CERTIORARI

Respondent Californians for a Citizen Government argues that the test enunciated in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) is not a form of strict scrutiny, but rather nothing more than a balancing test for ballot access cases. Brief of Respondent, Californians for a Citizen Government, In Opposition [hereinafter "CCG Opp."] at 6. The California Supreme Court below agreed. Slip Op. at 34, App. A to Petition for a Writ of Certiorari to the California Supreme Court [hereinafter App. A] at A-22. And respondents correctly note that the Ninth Circuit in *Erum v. Cayetano*, 881 F.2d 689, 692 n.7 (9th Cir. 1989), read *Anderson* not to require strict scrutiny. CCG Opp. at 7.

The California Supreme Court purported to "apply" the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), without recognizing, as this Court consistently has, that the balancing test is itself strict scrutiny. *See, e.g., Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J. concurring) (finding phrases such as "least drastic means" unhelpful, but concurring in Court's use of strict scrutiny). The *Anderson* test is no different from that used in *Illinois State Board of Elections v. Socialist Workers' Party*, 440 U.S. 173, 183-186 (1979), and in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 222 (1989), a decade later. They all require strict scrutiny. The formula in *Illinois State Board of Elections* begins with what appears to be a balancing test: "we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification." 440 U.S. at 183.

*Anderson* does the same:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.
>
> 460 U.S. at 789.

The test does not end there, however. In *Illinois State Board of Elections*, the Court went on to require a compelling state interest, and noted that finding "the least drastic means" was "particularly important where restrictions on access to the ballot are involved." 440 U.S. at 184-85. Although the Court did not discuss particular less drastic alternatives in *Anderson*, the Court concluded the *Anderson* opinion by citing precisely that doctrine as the basis for rejecting Ohio's filing deadline:

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. If the State has open to it a *less drastic* way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.
>
> 460 U.S. at 806 (quotations and citations omitted; emphasis added).

*Anderson* is therefore in harmony with the application of strict scrutiny in *Eu*, where this Court unequivocally held that in election cases, strict scrutiny must be applied:

> To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive

> constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest.
>
> 489 U.S. 214, 222 (1989) (citations omitted)

Only last month, this Court recognized the intimate relationship between the tests enunciated in *Illinois Elections Board* and *Anderson*, at least with respect to political parties, noting that the Court has required "any severe restriction" on access of new parties to the ballot "to be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, ___ U.S. ___, 112 S.Ct. 698, 705 (1992).

The problem is not just that the California Supreme Court failed to recognize that *Anderson* does in fact require strict scrutiny. Slip Op. at 34, App. A at A-22. The court also failed to recognize the legitimacy of the First Amendment issues, illustrated by its statement that Proposition 140 "does not affect speech interests." Slip. Op. at 31, App. A at A-20. The California Supreme Court's off-handed reference to "less drastic alternative" noted by the Attorney General in opposition cannot obscure the state court's express dismissal of strict scrutiny, its utter failure to seriously consider a less restrictive alternative to a lifetime ban on further service, and its heavy reliance on the Georgia and West Virginia executive term limit cases that applied a rational basis test. Slip Op. at 31, 34, 40-49, App. A at A-20, 22, 26-31.

The lower courts are badly in need of guidance as to the relationship of the *Eu* and *Anderson* standards. They particularly need that guidance in the context of term limits, which profoundly and permanently affect the right of voters to vote for the candidate of their choice. The California Supreme Court recognized this need when it attempted to deal with the right of candidacy, "[l]acking any more specific guidance from the high court, . . ." Slip. Op. at 34, App. A at A-22. That court also found that "it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure." Slip Op. at 39, App. A at A-25.

It is particularly important to consider these issues here, where the question of the appropriate standard of review is raised in the context of a lifetime ban on running for office. Term limits are clearly the most difficult and important election issue of the nineties and one that state and lower federal courts will grapple with throughout the decade. California's lifetime ban on further service is an extreme version of term limits. If the California Supreme Court's application of the *Anderson* test is correct, then term limits of whatever duration or hostility to representative government may be imposed at will. If the First Amendment is to be given any serious consideration at all, however, a lifetime ban must fall: it is not narrowly tailored to meet the measure's stated goals.

Of equal importance is the degree to which the decision below —if left to stand—oppresses the rights of California voters and candidates. There is no justification for a lifetime ban. Nor is there room, in a representative democracy, for voters outside of a candidate's district to dictate who the voters of that district may vote for.

## II

## THE ATTORNEY GENERAL'S DRAMATIC REVERSAL OF HIS LEGAL POSITION DEMONSTRATES THE NEED FOR CERTIORARI

In his brief to the California Supreme Court the Attorney General wrote that this Court appeared to have settled on a "definitive" test to evaluate the constitutionality of a state election law. Brief of Respondent March Fong Eu at 26. He stated:

> If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest [citations], and is narrowly tailored to serve that interest.
>
> *Id.* at 26-27, quoting *Eu*, 489 U.S. at 222.

In addition, the Attorney General wrote:

> Respondent agrees with petitioners that a lifetime ban on candidacy is not essential to accomplish the voters' purpose

> of preventing the development of an entrenched and self-perpetuating political machine in the Legislature. *Reasonably construed to require only a hiatus in multiple successive terms of office, Proposition 140 accomplished the voters' evident purpose in a manner that is less intrusive of constitutionally protected rights.*
>
> *Id.* at 26 (citation omitted, emphasis added).

The Attorney General had one strategy in the California Supreme Court—to convince the court to construe Proposition 140 to be a consecutive, rather than a lifetime ban. The Attorney General recognized that a lifetime ban was virtually indefensible, relegating his defense of it to a footnote. *See Id.* at 39 n.21.

Here, the Attorney General takes the position that something short of strict scrutiny is required and that even under strict scrutiny a lifetime ban is the least drastic alternative to achieving California's stated goal of reducing the power of incumbents. Opposition to Petition for Certiorari [hereinafter "Eu Opp."] at 15-17. The Attorney General, however, can barely bring himself to say why a lifetime ban is necessary to achieve the purpose of limiting incumbent power.

The Attorney General was correct below. The only reasonable way to save term limits, if they can be saved at all, is to construe them to be consecutive. Because the clear language of Proposition 140 made it impossible for the California Supreme Court to so construe the limits, the Attorney General is reduced in this court to altering his legal position to fit the decision below, a decision that it clearly inconsistent with this Court's First Amendment jurisprudence.

As we have discussed above and in the Petition for a Writ of Certiorari, the Attorney General's about-face illustrates the difficulty of applying the *Anderson* test without some clarification from this Court of the way in which *Anderson* and *Eu* interact, particularly with respect to the application of term limits.

## III

## THE MATTER IS RIPE FOR REVIEW

The Attorney General argues that some of the petitioners lack standing and that the matter is not ripe for review. Eu Opp. at 7-14, 18-25. The standing argument is little more than a theoretical exercise because, as the Attorney General concedes, there are ample voters and candidates who are parties and who have unquestioned standing.[1]

The ripeness claim marks another sharp reversal in legal position for the Attorney General, who "urge[d]" the California Supreme Court to take review. Preliminary Response of Respondent March Fong Eu at 2. He stated:

> Inasmuch as the petition presents issues of great public importance that should be resolved promptly and authoritatively and inasmuch as these issues may be decided upon uncontroverted facts, the Court should entertain the petition in the exercise of its original jurisdiction.
>
> Id. at 6 (citations omitted).

The Attorney General was correct below. The uncontested declarations below, now dismissed by the Attorney General as not controlling, demonstrate that the effect of term limits is immediate. Officeholders now look at short term legislative solutions, not long term solutions. They may be forced to take job opportunities they would not take in the absence of term limits. The

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[1] The Attorney General challenges the standing of only 10 of the 31 petitioners. The Attorney General challenges the standing of the Legislature, the Senate, the Assembly, the California Teachers Association, the Black American Political Association, Gary Hart, Alice Huffman, A. Alan Post, Deborah Seiler, and Steve Thompson. Eu Opp. at 25.

The Attorney General does not challenge the standing of legislators and voters David Roberti, Willie L. Brown, Jr., Kenneth L. Maddy, William A. Craven, Ed Davis, Cecil Green, Bill Lockyer, Dan McCorquodale, Robert B. Presley, Diane Watson, Bruce Bronzan, Peter R. Chacon, Jim Costa, Dan E. Hauser, Johan Klehs, Barbara Lee, Lucille Roybal-Allard, Aurora Castillo, Marshall Sharpe, Percy Steele, and Newton Wallace.

ripeness of this case is dependent not so much on the effect on petitioners of what will happen in 1994 or later, but rather on how petitioners will conduct themselves between now and then.

As the Speaker of the California Assembly testified in an uncontested declaration below:

> The devastating impacts of Proposition 140 are already being felt in the Assembly. Many members are reconsidering whether they will seek reelection in 1992. Rather than participating fully in the process of developing legislation to address the problems of the state, some members are inevitably preoccupied with consideration of other employment. Moreover, policy objectives that require many years to develop cannot even be considered by legislators who know they cannot be here to see them through. In short, the effect of term limits is already being felt.
>
> Declaration of Willie L. Brown, Jr. at Par. 7.

Further, the Attorney General's claim that no one will be affected until at least 1996 is simply wrong. Indeed, the Attorney General notes that petitioner David Roberti, who has been in the Senate for more than twenty years and has served as President Pro Tempore for ten years, would be permitted to serve only the remaining two and one-half years of the term he now seeks after redistricting. Eu Opp. at 12 n.14. Although Proposition 140 permits everyone else to remain in office until 1996, petitioner Roberti will be able to run only in 1992 and not again in 1994 or later.[2] Senator Roberti, who has served southern California for more than two decades, will almost certainly be elected in the special election on April 7, 1992. As soon as he is elected, however, he becomes a lame duck, barred for life from running for re-election in 1994 or ever again.

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[2] As a member of the Senate in 1990, Senator Roberti is permitted to run for only one more term, including the unexpired term for which he is now running. Cal. Const. art. XX, § 7. If the constitutionality of Propostion 140 and this provision is upheld, Senator Roberti will not be permitted to run, as he otherwise would, in 1994.

## CONCLUSION

The Petition for a Writ of Certiorari to the Supreme Court of California should be granted.

DATED: February 14, 1992.

Respectfully submitted,

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